



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Office of the General Counsel  
Washington, D.C. 20201

August 18, 1988

MEMORANDUM

TO: Dr. Everett R. Rhoades, M.D.  
Director, Indian Health Service

FROM: Ronald B. Guttman, Chief  
Business Law Branch  
Business and Administrative Law Division

SUBJECT: Criteria for Construction of Personnel Quarters;  
Request for Opinion 88-4

By memorandum dated March 21, 1988, you requested our advice, and that of the Deputy Assistant Secretary for Legislation (Health), both from a legal and political perspective, whether the Indian Health Service (IHS) is required to continue following the design criteria for construction of government-owned quarters contained in H.R. Rep. No. 2049, Conference Report, 87th Congress, 2nd Session (1962). This Conference Report accompanied the Department of Interior and Related Agencies Appropriation Act for fiscal year (FY) 1963, Public Law 87-578 (containing IHS' and BIA's appropriations), which provided no such standards, nor any reference to them. Your memorandum, and a May 24, 1988, memorandum from your staff, state that these design criteria are not imposed by any statute, including any IHS appropriation act. Your staff's memorandum notes, however, that these criteria have been incorporated by reference in many House of Representative Reports on IHS appropriation acts since FY 1963.

These design criteria, which IHS has been following since 1962, contain various size and quality restrictions on the construction of IHS employee-furnished quarters, e.g., homes may not exceed 3 bedrooms and 1,300 square feet exclusive of basement and garage. Your staff has informed us that these criteria are no longer adequate for IHS needs.

The IHS would like to follow the criteria for construction of family housing in Office of Management and Budget (OMB) Circular A-18, Revised, which authorize somewhat larger quarters. IHS notes that the OMB Circular A-18 standards are being followed by the Bureau of Indian Affairs (BIA), even though the 1962 Conference Report design criteria also applied to it.

IHS assumes that, since these design criteria are not required by statute, it is not legally bound to follow them. However, since the IHS attempts to follow the direction of congressional committee reports, and since these standards have been followed by IHS since 1962, you are seeking our legal advice on whether and how the IHS may adopt the OMB Circular A-18 criteria.

It is a general principle of law that directions in committee reports are not legally binding upon an agency, unless specified in the text of the law itself, or some other legislation. And this principle also obtains in the area of appropriations law. 59 Comp. Gen. 228 (1980) and 64 Comp. Gen. 359 (1985). In this case, IHS has advised us that the Conference Report's design criteria are not prescribed by any statute, but appear -only by reference- in the various congressional committee reports relating to IHS appropriation acts prior to FY 1985. Our independent research is consistent with that advice. Further, the House Report accompanying IHS' FY 1985 appropriation act, House Report 98-886, did not even reference these design criteria, as had been done previously. The legislative history of IHS' FY 1986-1988 appropriation acts is also silent regarding design criteria.

Since the design criteria were only described in the single Conference Report and referenced in various committee reports prior to FY 1985, but never imposed on IHS by law, it is our opinion that the IHS was never legally required to follow them. In any event, however, since no reference to design criteria is found in the committee reports since FY 84, it appears the Congress is no longer interested, even indirectly, in imposing them.

It is also noted that the Department of Interior now views this issue similarly. In 1973, Interior codified its then existing Departmental policies relating to the provision of employee housing, which included the Conference Report design criteria. 38 Fed. Reg. 20617 (August 2, 1973). These standards remained a part of Interior's regulations until January 1988. Then, through a final rule, Interior amended its regulation to drop the Conference Report design criteria and specifically to require that all its Bureaus shall be governed by the provisions of OMB Circular A-18, Revised, in determining the number, types, sizes and design standards of housing units to be provided to their employees. 53 Fed. Reg. 741 (January 12, 1988). In informally discussing this matter with the Solicitor's office at Interior, they advised us that their analysis supporting this change was essentially the same as ours.

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Based on the above, it is my opinion that the IHS may legally abandon following the Conference Report design criteria and utilize the OMB Circular A-18 standards instead. This change could be effected either by a policy issuance or, more formally, by a regulation. On the matter of the potential political aspects of this change in policy, I would defer to your office and the Deputy Assistant Secretary for Legislation (Health).